

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
December 8, 2009 Session

WILLIAM EARL MCCARVER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Sequatchie County
No. 8312 Buddy D. Perry, Judge

No. M2009-00753-CCA-R3-PC - Filed February 19, 2010

The Petitioner, William Earl McCarver, appeals from the Sequatchie County Circuit Court's denial of his petition for post-conviction relief. In 1998, the Petitioner was convicted by a jury of first degree premeditated murder and sentenced to life imprisonment. On appeal, the Petitioner makes broad allegations of ineffective assistance of counsel and prosecutorial misconduct. Following our review of the record and the parties' briefs, we conclude that the Petitioner has not shown that he is entitled to relief. The judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

DAVID H. WELLES, J., delivered the opinion of the Court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, William Earl McCarver.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Assistant Attorney General; and J. Michael Taylor, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Following a jury trial, the Petitioner was convicted of first degree premeditated murder for shooting his wife's boyfriend to death outside a gasoline station and convenience store. See State v. William E. McCarver v. State, No. M2002-00123-CCA-R3-CD, 2003 WL 22087476 (Tenn. Crim. App., Nashville, Sept. 9, 2003), perm. to appeal denied, (Tenn. Jan.

26, 2004). He was sentenced to life imprisonment in the Department of Correction. Id. at *1.

The underlying facts, as established by the evidence presented at the Petitioner's trial, were summarized in detail in this Court's opinion adjudicating the Petitioner's direct appeal. See id. at *1-17. Briefly stated, the victim had been having an affair with the Petitioner's wife, and they had been openly living together prior to the shooting. Id. at *1. Approximately four weeks before the shooting, the Petitioner and the victim's sister had a confrontation, during which the Petitioner denied having put sugar in the victim's gas tank, but also stated he was not through with the victim yet. Id. at *2. On the morning of the shooting, the victim went to Jeff Turner's automotive shop to discuss some repairs. Id. at *3. Although Turner acknowledged he could not be sure, he testified that he saw the Petitioner, in his distinctive pickup truck, pull in behind the victim's vehicle parked in front of the automotive shop, before pulling back onto the highway and heading north in the direction of the Golden Gallon convenience store. Id. After sitting in his parking spot at the convenience store for a few minutes, and following the victim's exit from the store, the Petitioner reversed out of his spot and then drove up to the island at which the victim's vehicle was parked. Id. at *3, 19. The victim was sitting in his truck, waiting on his eight-year-old nephew to exit the store. Id. at *1. The Petitioner fired two shots at the victim, one of which went through his brain and the other which struck him in the heart and liver. Id. at *7. Eyewitnesses testified that the Petitioner stepped up onto the pump island and leaned toward the victim's vehicle before the second shot was fired; one witness stated that she saw the Petitioner reach his arm almost inside the vehicle. Id. at *4-5. Most of the events were captured by surveillance cameras. Id. at *4, 7-8. A number of witnesses also testified that there was an interval of several seconds between the two shots, and the Tennessee Bureau of Investigation firearms expert testified that the murder weapon was a six-shot, single action pistol that required the hammer to be manually cocked before each successive shot could be fired. Id. at *4-5, 7.

Following the shooting, the Petitioner immediately turned himself in at the sheriff's department, claiming that he shot the victim in self-defense after the victim pulled a knife on him. Id. at *1. At trial, the Petitioner did not dispute that he shot the victim, but instead attempted to show that the shooting occurred in self-defense and/or that his medical problems, particularly those associated with the triple heart bypass surgery he had undergone some seven weeks before the shooting, prevented him from forming the requisite intent for a first degree premeditated killing. Id. The jury concluded the shooting was intentional and premeditated. This Court affirmed the Petitioner's conviction, including the sufficiency of the evidence, on direct appeal. See id. Our supreme court denied the Petitioner's request for permission to appeal on January 26, 2004.

On December 20, 2004, the pro se Petitioner filed a petition for post-conviction relief alleging numerous grounds for post-conviction relief.¹ A hearing was held on June 19, 2007, at which argument focused on the following issues: (1) the State committed prosecutorial misconduct in its closing argument; (2) the trial court improperly instructed the jury “as to the law”;² (3) trial counsel was ineffective for failing to investigate and adequately prepare for the testimony of Jeff Turner, which established the “principal element of premeditation”; and (4) the jury was tainted by extraneous information.

Trial counsel was first to testify. Trial counsel recalled the testimony of Jeff Turner at the Petitioner’s trial, and he remembered that there was some dispute about whether Mr. Turner saw the Petitioner at his place of business shortly before the murder. When asked about Mr. Turner’s testimony at the Petitioner’s bond hearing, trial counsel remembered that Mr. Turner was “somewhat ambivalent about whether or not he saw what he initially claimed to have seen in his direct-examination”; Mr. Turner “equivocated on exactly what he saw.”

Trial counsel confirmed that Mr. Turner’s testimony was material to the case in establishing premeditation. When asked about his knowledge of Mr. Turner’s automotive shop, trial counsel relayed that he had been to the shop before. Trial counsel recalled that Mr. Turner indicated he was talking to the victim in the back of the shop. While he did not send anyone to photograph or videotape the business, trial counsel believed, from his personal knowledge, that it would have been possible to have seen vehicles in front of the business while standing at the back of the shop. Trial counsel opined that photographs or videotaping would not have been “productive.” While in “hindsight” it might have been helpful to have photographs with which to cross-examine Mr. Turner on this point, it could have also had the “opposite effect[,]” instead bolstering his testimony. Trial counsel agreed that, if it would have been proven impossible for Mr. Turner to see the Petitioner’s vehicle from his position inside the shop, then it “certainly” might have altered the proof as to premeditation.

Trial counsel believed he effectively cross-examined Mr. Turner at trial, getting Mr. Turner to admit that he could not positively identify the man in the white truck as the Petitioner. Trial counsel also questioned Mr. Turner about his previous testimony at the bond hearing. He confirmed that he was assisted by another lawyer from his firm in handling the Petitioner’s trial.

¹ Counsel was appointed to represent the Petitioner in his post-conviction action, but no amended petition was filed.

² It does not appear from the record before this Court that this issue was ever further developed.

Mr. Turner was called to testify. His testimony was similar to the account of events he gave at trial, testifying that he saw the Petitioner drive in and briefly park behind the victim's vehicle at the automotive shop. He remembered testifying at both the bond hearing and the Petitioner's trial. Mr. Turner recalled that he discussed the incident with the police and "several people"; however, he could not remember ever speaking with trial counsel or anyone from trial counsel's office. Mr. Turner confirmed that he knew of some "trouble" between the Petitioner and the victim prior to the day of the shooting.

When asked about his criminal record prior to the Petitioner's 1998 trial, Mr. Turner stated that he "got caught with cocaine[,] but that he did not do any time in jail. Mr. Turner later explained that the charge was possession with intent to sell and that he got fined and "did 5 or 600 hours of community service." He confirmed that he did not advise the district attorney's office or any of the investigators of his record.

Following the hearing, post-conviction counsel submitted a brief along with late-filed exhibits: a transcript of Jeff Turner's testimony at trial and a transcript of the State's closing argument. The Petitioner argued in his brief that the prosecutor made prejudicial comments during closing argument.

After reviewing the evidence presented, the post-conviction court denied relief by written order. This appeal followed.³

Analysis

The Petitioner essentially raises two challenges in this appeal: one aimed at the State's closing argument and the other at Jeff Turner's testimony.⁴ To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and

³ The State argues that we should dismiss the appeal because the Petitioner's notice of appeal document was not timely filed. A memorandum opinion denying relief was filed on November 19, 2008, followed by an order of dismissal entered on January 8, 2009. The Petitioner moved to set aside the January 8 order so that he could file a timely notice of appeal. In an amended order filed on March 12, 2009, the court granted the Petitioner's request, stating that such was "with the agreement and concurrence of the State and it appearing to the court that there has been justifiable excusable reason for the [Petitioner], through his attorney, . . . not to file a notice of appeal within the time provided by law" The notice of appeal document was then filed on April 7, 2009. While the State correctly notes that the post-conviction court had no authority to alter the judgment once it became final in order to waive the late-filing of the notice appeal, the notice of appeal document is not jurisdictional. *See* Tenn. R. App. 4(a). Based upon the finding of the post-conviction court that there was justifiable excuse for the delay, we will waive the timely filing of such document in the interest of justice.

⁴ We agree with the State that the Petitioner's presentation of the issues in this appeal is less than clear.

convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

I. Prosecutorial Misconduct

A. Closing Argument

The Petitioner argues that the post-conviction court erred by not granting relief based upon misconduct by the prosecutors⁵ during closing argument.

Within the closing argument, five general areas of prosecutorial misconduct are recognized:

1. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
2. It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
3. The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
4. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
5. It is unprofessional conduct for a prosecutor to intentionally refer to or argue facts outside the record unless the facts are matters of common public knowledge.

⁵ Two different prosecutors were involved in closing argument.

State v. Goltz, 111 S.W.3d 1, 6 (Tenn. Crim. App. 2003) (citations omitted). When argument is found to be improper, the established test for determining whether there is reversible error is whether the conduct was so improper or the argument so inflammatory that it affected the verdict to the defendant's detriment. Harrington v. State, 385 S.W.2d 758, 759 (1965).

The Petitioner points to several "I think" or "I submit" statements made during closing argument and contends that the prosecutors improperly asserted their personal beliefs or opinions "as to premeditation." He also cites to another statement wherein the prosecutor stated that Mr. Turner had "no reason to lie" about his identification of the victim.

While not addressed by the post-conviction court, the Petitioner's prosecutorial misconduct claim has been waived because the Petitioner failed to raise the claim on direct appeal. Tennessee Code Annotated section 40-30-106(g) provides as follows:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

(1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

The Petitioner's ground for relief that the prosecutors made improper statements during closing argument should have been brought on direct appeal, and this claim for relief is not "based upon a constitutional right not recognized as existing at the time of trial." Also, the Petitioner's failure to present this claim on direct appeal was not "the result of state action in violation of the federal or state constitution." Accordingly, we conclude that the Petitioner has waived this issue.

The post-conviction court decided the issue on the merits and concluded that the prosecutors "did not express their own opinions as to the truth or falsity of any particular witnesses' testimony or piece of evidence. . . . The prosecutors characterized the theory of the [S]tate regarding the [P]etitioner's motive in killing the victim, and asked the jury to look logically at any motive which any witness would have had to present false testimony." Additionally, the court found that the prosecutors' statements did not "infect the trial with

unfairness sufficient to equate denial of due process.” The Petitioner has failed to show that the record preponderates against the post-conviction court’s determinations in this regard.

B. Perjured Testimony

The Petitioner makes a vague allegation of prosecutorial misconduct in that the State presented perjured testimony through Jeff Turner. However, this allegation is not supported by an argument or citation to authorities. The Petitioner has again waived this issue. See Tenn. Ct. Crim. App. R. 10(b); see also Tenn. R. App. P. 27(a)(7). Moreover, as noted by the post-conviction court, “Mr. Turner’s testimony was typical of any eye witness. He did not repeat every detail the same. However, there is no evidence in the record to indicate that Mr. Turner perjured himself or that the State intended to use perjured testimony.”

Significantly, this Court has previously determined that allegations that the prosecution used false or perjured testimony in order to obtain a conviction is tantamount to a challenge to the sufficiency of the evidence. See Gant v. State, 507 S.W.2d 133, 136 (Tenn. Crim. App. 1973). Issues relating to the sufficiency of trial evidence and the competency and credibility of witness testimony presented at trial are not cognizable in a post-conviction proceeding. Id. Also, it is well-established that post-conviction proceedings may not be employed to raise and relitigate issues previously determined on direct appeal. See, e.g., Miller v. State, 54 S.W.3d 743, 747-48 (Tenn. 2001); Long v. State, 510 S.W.2d 83 (Tenn. Crim. App. 1974). In the instant case, this Court reviewed the Petitioner’s allegations concerning the sufficiency of the evidence and the credibility of the witnesses on direct appeal and rejected them at that time. Therefore, the Petitioner’s issues have been previously determined and are not subject to further review by this Court.

C. Exculpatory Evidence

As a final area of misconduct, the Petitioner contends that the State withheld exculpatory evidence from him. He submits the State knew, or should have known, (1) about Mr. Turner’s cocaine conviction and (2) that Mr. Turner and the victim were close friends and, just days before the shooting, the victim told Mr. Turner of “trouble” with the Petitioner; however, the State did not disclose this evidence to the Petitioner.

Initially, we note that the Petitioner’s allegations of the State withholding exculpatory evidence from him, if proved to be true, would provide an appropriate ground for post-conviction relief. See State v. Bowers, 77 S.W.3d 776 (Tenn. Crim. App. 2001). In Brady v. Maryland, 373 U.S. 83 (1963), the United States Supreme Court established the prosecution’s duty to furnish the accused with exculpatory evidence upon request by the defense. Id. at 87. Exculpatory evidence was defined as pertaining to the guilt or innocence of the accused and/or the punishment that may be imposed if the charge results in a conviction. State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App. 1992); see Bates v.

State, 973 S.W.2d 615, 638 (Tenn. Crim. App. 1997). Any “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” Brady, 373 U.S. at 87. The duty to disclose exculpatory evidence extends to all “favorable information” irrespective of whether the evidence is admissible at trial. Johnson v. State, 38 S.W.3d 52, 56 (Tenn. 2001). “Favorable information” includes evidence that could be used to impeach the State’s witnesses. Id. at 55-56 (citations omitted). While Brady does not require the state to investigate for the defendant, it does burden the prosecution with the responsibility of disclosing statements of witnesses favorable to the defense. State v. Reynolds, 671 S.W.2d 854, 856 (Tenn. Crim. App. 1984). However, this duty does not extend to information that the defense already possesses, or is able to obtain, or to information not in the possession or control of the prosecution or another governmental agency. Marshall, 845 S.W.2d at 233. Under Brady, the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government’s behalf in the case, including the police. Kyles v. Whitley, 514 U.S. 419, 437 (1995).

In order to establish a due process violation under Brady v. Maryland, a defendant must demonstrate the following:

1. The defendant must have requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
2. The State must have suppressed the information;
3. The information must have been favorable to the accused; and
4. The information must have been material.

State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). This Court has clarified that, with respect to the first element, the issue is whether the evidence, when viewed by the prosecution, is obviously exculpatory. State v. Spurlock, 874 S.W.2d 602, 609 (Tenn. Crim. App. 1993) (citations omitted). In order to establish that exculpatory evidence is “material,” a petitioner must show that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” Kyles v. Whitley, 514 U.S. at 435; see also Edgin, 902 S.W.2d at 390. There must be a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” Edgin, 902 S.W.2d at 390 (quoting Kyles, 514 U.S. at 435). The appropriate standard of materiality is not determined by its effect upon the defense’s ability to prepare for trial but, instead, relates to the issues of guilt or innocence:

[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, the additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976). The Petitioner bears the burden of proving a Brady violation by a preponderance of the evidence. Id.

Here, the Petitioner complains that the State failed to turn over Brady material, the arrest and conviction records of Jeff Turner (disclosing a cocaine conviction) and information that Mr. Turner knew of “trouble” between the Petitioner and the victim. The Petitioner claims that he could have impeached the witness with this conviction and information and that the impact of impeaching Mr. Turner would have been great because of the importance of the substance of his testimony (premeditation).

The Petitioner did not introduce into evidence or otherwise present a copy of the judgment of Mr. Turner’s cocaine conviction. There is no proof that either of the prosecutors knew of the conviction. It was unclear from the testimony at the post-conviction hearing if this was a misdemeanor or felony conviction. Without knowing the complete details of the conviction, we cannot determine whether the conviction could have been used for impeachment purposes. See Tenn. R. Evid. 609. It is the Petitioner’s duty to provide a full and complete record. Moreover, we cannot say with any certainty that there is a reasonable probability that the outcome of the trial would have been different. Furthermore, this Court has previously rejected arguments that a defendant was prejudiced by the State’s failure to provide arrest and conviction records in response to a discovery motion. See State v. Hinson, No. M2000-02762-CCA-R3-CD, 2002 WL 31202134, at * 10 (Tenn. Crim. App., Nashville, Sept. 27, 2002). “In those contexts, this Court found that the defendant was not prejudiced by the state’s omission because the arrest records of potential trial witnesses and all conviction records are available upon request per statute.” Id. (citations omitted). We conclude that the Petitioner has not met his burden of proving a Brady violation.

II. Ineffective Assistance

The Petitioner argues that he received the ineffective assistance of counsel. He asserts that he was denied the effective assistance of counsel because trial counsel failed to adequately investigate and prepare for the testimony of a “critical” State’s witness, Jeff Turner, whose testimony supported a premeditated act. The Petitioner claims that, as a result,

trial counsel failed to effectively cross-examine this witness. He further submits that Turner's testimony was so incredible that no reliable evidence of premeditation existed.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that

deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court’s conclusions.” Id. (emphasis in original).

Trial counsel testified that he was personally familiar with Mr. Turner’s automotive shop and that he believed that Mr. Turner was capable of viewing the Petitioner’s truck from inside the shop. Trial counsel stated that he did not know about Mr. Turner’s cocaine conviction.

The post-conviction court found that the cross-examination of Jeff Turner “was consistent with the overall strategy” On direct appeal, this Court summarized Mr. Turner’s testimony as follows:

Jeff Turner testified he operated J & J Complete Car Care in Dunlap, which was located approximately three-quarters of a mile from the Golden Gallon on Highway 127. He was acquainted with both the victim and the [Petitioner] and with their respective vehicles. The [Petitioner] drove a distinctive, 1996 or 1997 model, white Ford extended cab pickup truck. According to Turner, in one of those years, Ford dramatically changed the design on their pickups, and he knew of only two such trucks in Dunlap at the time. He said he was able to distinguish the [Petitioner’s] truck by the bug deflector across the hood and the front tag which read “Southern Exposure.”

Turner testified the victim pulled into his shop on the morning of August 14, 1996, to discuss some automotive repairs he needed on his Chevrolet pickup. The victim was driving his blue Ford four-wheel drive pickup truck at the time and was accompanied by a young boy. During his ten-to fifteen-minute conversation with the victim, Turner saw the [Petitioner], driving his white Ford pickup truck, pull off the highway behind the victim’s vehicle and sit for a minute before pulling back out onto the highway and heading north in the direction of the Golden Gallon. The [Petitioner] was wearing a cowboy hat, which Turner believed was dark-colored. Approximately four or five minutes later, the victim left, also driving north. Turner said the victim did not see the [Petitioner], and he did not inform the victim of the [Petitioner’s] presence behind his vehicle. Five to ten minutes after the victim left his shop, Turner saw police cars and an ambulance “go flying by” his business and later learned the victim had been killed.

Turner acknowledged on cross-examination his testimony at the bond hearing had been that the [Petitioner] was stopped for only a second behind the victim’s vehicle. He conceded traffic might have been busier than usual that

day because of the start of the Highway 127 flea market, which brought in people from “Tennessee, Alabama, Georgia, Kentucky,” and elsewhere. He further acknowledged he had not been in a position to see a “Southern Exposure” tag on the front of the white Ford pickup, and had told defense counsel at the bond hearing he was not sure it was the [Petitioner] he had seen driving the vehicle. He testified on redirect, however, that he remembered the vehicle’s having had a bug deflector across the hood. During recross-examination, which occurred at a later point during the presentation of the State’s case in chief, Turner testified that a few minutes after the victim left his shop heading north, he saw another white Ford truck that looked like the [Petitioner’s] pass his shop, also heading north on Highway 127.

McCarver, 2003 WL 22087476, at *2-3. In essence, the Petitioner’s argument is again just a general attack on Mr. Turner’s credibility, and the evidence has been determined to be sufficient. Trial counsel thoroughly cross-examined Mr. Turner and brought out the discrepancies in his statements. Moreover, the Petitioner has not established prejudice, as strong evidence of premeditation, in addition to Mr. Turner’s testimony, was presented to the jury. We agree with the post-conviction court that the Petitioner has not shown ineffective assistance of counsel.

Conclusion

Based upon the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

DAVID H. WELLES, JUDGE